No. 77-1722

In the Supreme Court of the United States

OCTOBER TERM, 1978

LAWRENCE DALIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

WILLIAM C. BRYSON
KENNETH S. GELLER
Assistants to the Solicitor General

JEROME M. FEIT
KATHERINE WINFREE
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases: Page

Cases—Continued Page

Cases—Continued — Page

Cases—Continued — Page

Constitution, statutes and rule:

Miscellaneous—Continued

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1722

LAWRENCE DALIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 575 F.2d 1344. The opinion of the district court (excerpted at Pet. App. 10a-18a) is reported at 426 F. Supp. 862.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8a-9a) was entered on May 3, 1978. The petition for

a writ of certiorari was filed on June 2, 1978, and was granted on October 2, 1978, limited to Question One of the petition (Pet. 2). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether federal law enforcement agents, in executing a valid court order authorizing the interception of oral communications at specified business premises, may enter those premises surreptitiously and without express judicial approval to install the device used to make the authorized interceptions.

STATUTE AND RULE INVOLVED

18 U.S.C. 2518 provides in pertinent part:

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which

or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

Rule 41 of the Federal Rules of Criminal Procedure provides, in pertinent part:

> (b) Property Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits

of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

* * * * *

(d) Execution and Return with Inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of receiving goods stolen from an interstate shipment, in violation of 18 U.S.C. 2315, and of conspiracy to transport, receive, and possess the goods, in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of five years' imprisonment. The court of appeals affirmed (Pet. App. 1a-8a).

1. On March 27, 1973, Joseph Palase, a member of a group of fabric thieves, asked petitioner if he could store "a load of merchandise" on petitioner's business premises in Linden, New Jersey (Tr. 1.64-1.65, 2.65-2.69, 2.87-2.88). Petitioner refused this request because on a previous occasion he had been angered about the way the transaction had been handled and about the fact that he had been paid only $300 to store the merchandise (Tr. 3.140-3.141, 3.167-3.172, 4.54-4.60, 4.73-4.75). Instead, petitioner arranged for another associate, Joseph Higgins, to store the stolen goods (Tr. 2.65-2.69, 2.87-2.89, 3.135-3.139, 3.157-3.158). Higgins and petitioner agreed to divide the $1,500 fee they expected to receive for concealing the merchandise (Tr. 2.60-2.62, 3.139, 3.158, 3.162-3.163).

On April 3, 1973, co-defendant Daniel Rizzo and two other men hijacked a Farah Manufacturing Company tractor-trailer in Brooklyn, New York. The truck was carrying 664 rolls of polyester fabric valued at approximately $250,000 (Pet. App. 2a; Tr. 3.68-3.77, 3.88-3.91, 4.64-4.70). Later that day, the fabric was unloaded at Higgins' warehouse in Woodbridge, New Jersey (Tr. 1.70-1.73). The truck was then abandoned on Staten Island (Tr. 1.73, 2.21-2.22). Two days later, FBI agents arrested Higgins, Palase, and three other persons at Higgins' warehouse as

they were loading the stolen rolls of fabric onto two U-Haul trucks (Tr. 1.77-1.88, 1.90-1.91, 2.29-2.30, 3.163-3.166).

2. At trial, the government introduced tape recordings of 13 telephone conversations to which petitioner was a party and eight conversations that took place in his office. The telephone conversations (the admissibility of which is not challenged here) were intercepted pursuant to court orders entered on March 14, 1973, and April 5, 1973.[1] They included the conversation in which petitioner arranged with Higgins to let the fabric thieves store their booty at Higgins' warehouse (Tr. 2.60-2.62), conversations between petitioner and Palase regarding the storage arrangement (Tr. 2.65-2.69, 2.75-2.81, 2.87-2.88, 2.90, 2.92-2.93), and conversations in which petitioner was informed of the arrests and advised others who had not been arrested to "sit tight" and not to use the telephone (Tr. 2.97-2.99, 2.100-2.102).

The recordings of the eight conversations in petitioner's office that were admitted at trial were intercepted pursuant to the court order of April 5, 1973.[2] In the course of those conversations, all of which took place after Higgins and the fabric thieves had been arrested, petitioner discussed the arrests, speculated that someone had "put the finger" on Higgins, and made statements reflecting his involvement in the fabric storage operation and in other schemes involving the storage of stolen property (see, *e.g.*, Tr. 3.63, 3.80-3.86, 3.100, 3.182-3.184).

3. The government's application for authorization to conduct oral interceptions included an affidavit by FBI Agent Douglas L. Hokenstad, who was then in charge of the investigation. The affidavit provided an extensive account of the investigation of petitioner's on-going dealings in stolen goods and set forth reasons to believe that petitioner used his office on a regular basis to discuss the sale of stolen goods (Hokenstad Affidavit, attached to application for April 5, 1973, order).

On the basis of the application and the affidavit, the district court entered the April 5 order authoriz-

---

[1] The two wire interception orders were entered pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520. The first order authorized wire interceptions for a period of 20 days, and the second order extended the authorization for an additional 20 days (Pet. App. 2a-3a; A. 6a-10a). A third wire interception order was entered on April 27, 1973, extending the authorization for an additional 20 days (A. 11a-15a), but no conversations intercepted under the authority of that order were introduced at trial. All three orders were entered by Judge Frederick B. Lacey, who also presided at petitioner's trial.

[2] The April 5 order that authorized the continuation of the wire interceptions also provided the initial authorization for the interception of oral communications in petitioner's office (A. 8a). This authorization was extended on April 27 (A. 11a-15a), but no conversations intercepted pursuant to that extension order were admitted at trial. Six of the eight conversations overheard by means of the devices placed in petitioner's office and admitted in evidence at trial took place on April 6, the day after the arrests (Tr. 3.63-3.64, 3.78-3.86, 3.98-3.100, 3.101-3.102, 3.103-3.105, 3.175-3.186), one took place on April 9 (Tr. 4.73-4.75), and the last took place on April 17 (Tr. 4.93-4.94).

ing the initiation of interception of oral communications and the continued interception of wire communications (A. 6a-10a). The court found probable cause to believe that petitioner and others were engaged in thefts from interstate shipments, sale or receipt of stolen goods, interference with commerce by threats or violence, and conspiracy (A. 6a). The court further found that there was probable cause to believe that the authorized wire and oral communications would provide evidence concerning these offenses and that normal investigative methods appeared unlikely to succeed and were too dangerous (A. 7a). In particular, the court found that petitioner's office "[was] being used, and is being used by [petitioner] and others as yet unknown in connection with the commission of the above-described offenses" (*ibid.*).

Accordingly, the April 5 order authorized FBI agents to intercept oral communications in petitioner's office, which was specifically identified as the 15- by 18-foot room in the northwest corner of the one-story building that housed his business operation (A. 8a). The order provided that the authorization to intercept both oral and wire communications "shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception * * *" (A. 9a). The order did not otherwise specify the manner of execution, except to provide that the New Jersey Bell Telephone Company should furnish all information, facilities and technical assistance necessary to ac-

complish the wire interception unobtrusively (A. 9a). The order contained no explicit authorization for agents to enter petitioner's place of business to install the listening device necessary to intercept the oral communications.

At about midnight on the night of April 5-6, FBI agents secretly entered petitioner's office for the purpose of installing an electronic listening device (A. 31a-32a). The agents entered the building through an open side window; after determining that the building was empty, they went to petitioner's office, where they installed the listening device in the acoustical tiles in the ceiling directly above petitioner's desk (A. 31a-32a, 36a-39a; Exhibit A, attached to Gov't C.A. Br. at 3, 6, 9). The installation and testing procedure took about two to three hours (A. 39a-40a). The agents seized no evidence while they were in the building (A. 32a).

The listening device functioned without need for adjustment throughout the period for which the oral interceptions were authorized, and between the date of installation and the date of removal the agents made no entries onto the premises (A. 32a, 42a). On May 16, 1973, all electronic surveillance ended. That night, FBI agents re-entered the building through the same window and removed the listening device (A. 36a, 40a-41a).

4. Prior to trial, petitioner moved to suppress the evidence obtained by means of the electronic surveillance. Among the grounds urged for suppression was that the agents lacked authority to make the surreptitious entries into petitioner's office to install and

remove the listening device (Tr. 1.3-1.12). The district court denied the motion without prejudice to renewal at the close of trial (Tr. 1.17).

After trial, the court held an evidentiary hearing on petitioner's motion. Following the hearing, the court denied the motion, finding that the entry into petitioner's business premises was the safest and most successful method of installing the listening device needed to accomplish the interception (Pet. App. 17a). In most cases, the court observed, "the only form of installing such devices is through breaking and entering. The nature of the act is such that entry must be surreptitious and must not arouse suspicion, and the installation must be done without the knowledge of the residents or occupants" (*id.* at 17a-18a). Accordingly, the court held that once a showing of probable cause is made to support the issuance of a court order authorizing the interception of oral communications, "thereby sanctioning the serious intrusion caused by interception, implicit in the court's order is concomitant authorization for agents to covertly enter the premises in question and install the necessary equipment" (*id.* at 18a).

5. The court of appeals affirmed (Pet. App. 1a-8a). It accepted Judge Lacey's finding that surreptitious entry was the most effective means for installing the listening device as well as his findings that the installation was based on probable cause and was executed in a reasonable fashion (*id.* at 7a). In these circumstances, the court held, neither Title III nor the Fourth Amendment required express authori-

zation for the entry beyond that provided by the authorization for the interception itself. The court noted, however, that it was not adopting a rule that specific authorization for a surreptitious entry would never be required and stated that in the future it would be preferable for government agents to include a statement regarding the need for such an entry when a break-in is contemplated (*ibid.*). But on the facts of this case, the court held that the agents' failure to include a specific entry provision in their request for authorization to conduct an interception of oral communications did not result in a constitutional or statutory violation and did not require suppression of the intercepted conversations.

SUMMARY OF ARGUMENT

The intercepted oral communications that were introduced at trial in this case were seized pursuant to a surveillance order entered by the district court under the authority of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The order specified the location at which the interceptions were to take place, the persons whose conversations were to be intercepted, and the offenses for which the investigation was being conducted. The order did not, however, specify the mode by which the FBI agents conducting the investigation should install the listening device necessary to execute the surveillance order. Petitioner challenges the admission of the recordings of oral communications in his office on three grounds: first, that the Constitution does not em-

power courts to authorize law enforcement officers to make surreptitious entries to install electronic surveillance equipment under any circumstances; second, that courts have no statutory authority to permit officers to make such entries; and third, that because the surveillance order did not contain express authorization for a surreptitious entry, the entry in this case—and the resulting interceptions of petitioner's conversations—violated the Fourth Amendment.

1. The Fourth Amendment contains no absolute prohibition against surreptitious entries. A forcible entry onto private property is plainly permissible in executing a search warrant; a court-authorized search does not depend on the acquiescence of the owner or occupant of the property to be searched. Thus, petitioner's broadside constitutional attack on surreptitious entries made to execute a surveillance order must be an objection to the surreptitious nature of the entry, that is, to the lack of prior or contemporaneous notice to the owner or occupant of the premises. But prior notice of entry is not constitutionally required in the context of electronic surveillance. To give notice of entry to install electronic eavesdropping equipment would plainly destroy the purpose of the search: to obtain incriminating conversations without the speaker's awareness that they are being recorded. This Court has clearly indicated that electronic eavesdropping is not unconstitutional if properly authorized by a court, and Title III provides a constitutionally permissible scheme of court authorization for that form of investigation. Thus,

even if the Constitution imposes a requirement that police give notice before entering a home to execute a conventional search warrant, that constitutional principle has no application to entries made to execute a court's surveillance order, particularly when the building entered is not a private home, but an unoccupied business office.

2. The statutory authority for the entry to install electronic eavesdropping equipment is furnished by Rule 41 of the Federal Rules of Criminal Procedure. That rule provides for the seizure of property of various kinds, and it implicitly authorizes law enforcement agents to enter private premises where necessary to search for and seize such property. Nothing in Title III suggests that Congress intended to restrict the authority granted under Rule 41 to enter private premises to execute a court order. In fact, the legislative history of Title III plainly indicates that Congress was aware that surreptitious entries onto private premises would be necessary to conduct electronic eavesdropping in many cases. Accordingly, the general statutory authority to enter private premises granted by Rule 41 applies in the case of entries to conduct electronic surveillance as well as in the case of more conventional searches.

3. Although the surveillance order in this case did not contain any express authorization for the surreptitious entry, no such authorization is required either by Title III or by the Fourth Amendment. While Title III contains detailed requirements respecting what must be shown to obtain a surveillance

order, it is silent regarding the mode of entry to execute an order issued under its provisions. Thus Title III nowhere, expressly or by implication, requires that a court authorizing electronic surveillance specifically describe the means by which the surveillance will be carried out, including an authorization of surreptitious entries if that is necessary.

The Fourth Amendment also does not require express prior authorization of the method used to execute the surveillance order. The protections of the Fourth Amendment against unreasonable searches and seizures apply, of course, to the methods used by law enforcement agents to carry out court-authorized electronic surveillance. But in this case there is no doubt that the use of a covert entry to install the listening device was a constitutionally reasonable procedure. Both courts below found that it was the only feasible means of executing the eavesdropping order, and petitioner does not challenge those findings.

Since the action of the agents was reasonable, petitioner can prevail only if the Fourth Amendment bars all entries, no matter how necessary or reasonable, in the absence of express advance judicial authorization. We contend that a court issuing a warrant need not specify the manner in which a search is to be conducted. Instead, the lawfulness of the means used to execute a warrant should be determined by a subsequent evaluation of the reasonableness of the agents' actions. In circumstances such as those of this case, where the need for a surreptitious entry was evident at the time the court considered

the application and authorized the eavesdropping, we submit that the issuance of the order constituted implicit authorization of the covert entry necessary to carry it out.

Our analysis is supported by examination of the rules governing conventional searches. Under the Fourth Amendment's Warrant Clause, warrants authorizing such searches must particularly describe the place to be searched and the things to be seized. But neither the text of the Amendment nor traditional practice requires any separate, express authorization of the particular means to be used to execute the warrant, including any forcible entry into private premises that may be required. Rather, the authorization to make an entry is implicit in the authorization to conduct the search. The manner of entry is subject to constitutional inquiry for reasonableness, but that inquiry focuses upon the particular means employed, not upon the content of the warrant.

Of course, the warrant procedure can be used to provide advance protection against unreasonable methods of executing a search if the court or magistrate so chooses. The judicial officer has the power to inquire into the means to be employed to carry out the search and to impose such restrictions thereon as he deems appropriate. In the present case, where it was evident from the application that a covert entry was likely to be essential to install the listening device, no such restrictions were deemed necessary, and none was imposed.

We acknowledge that it is ordinarily preferable for the agents to seek and the court to give express authorization for any covert entry necessary to execute an electronic surveillance order. The Department of Justice has modified its procedures so that express authorization is now sought whenever a covert entry will be necessary. But the procedure employed in this case violated neither statutory nor constitutional requirements, and there is accordingly no occasion to suppress the conversations intercepted and used in evidence at petitioner's trial.

ARGUMENT

I

THE FOURTH AMENDMENT DOES NOT PROHIBIT COURT-AUTHORIZED SURREPTITIOUS ENTRIES TO INSTALL ELECTRONIC EAVESDROPPING DEVICES

Petitioner argues (Br. 19-24) that the Fourth Amendment prohibits law enforcement agents from making surreptitious entries onto private property to install eavesdropping devices, even if the entries are made pursuant to court authorization. This contention has been rejected by every court of appeals that has ruled on it,[3] and it is inconsistent with this

[3] In addition to the court of appeals in this case, the courts of appeals for the Second, Fourth, and Eighth Circuits have held that the Constitution does not impose an absolute ban on surreptitious entries to install eavesdropping devices. See *United States* v. *Scafidi*, 564 F.2d 633, 640, 642 (2d Cir. 1977), cert. denied, 436 U.S. 903 (1978); *Application of*

Court's analysis of the application of the Fourth Amendment to electronic surveillance.

It is indisputable that law enforcement agents may break and enter private property to execute a search warrant. Accordingly, petitioner's attack cannot be on the entry itself, but must be that the Fourth Amendment absolutely bars entries conducted in a surreptitious manner, *i.e.*, without contemporaneous notice to the individual whose premises are entered. Yet in the context of electronic surveillance, prior or contemporaneous notice would plainly destroy the viability of the search. Since court-authorized electronic eavesdropping is constitutionally permissible, the Fourth Amendment's command of reasonableness does not prohibit surreptitious entries onto private property when such entries are necessary to install

United States, 563 F.2d 637, 643-644 (4th Cir. 1977); *United States* v. *Agrusa*, 541 F.2d 690, 696-698 (8th Cir. 1976), cert. denied, 429 U.S. 1045 (1977). Three other courts of appeals have declined to decide whether surreptitious entries to install eavesdropping devices are absolutely prohibited by the Fourth Amendment itself. See *United States* v. *Santora*, 583 F.2d 453, 463 (9th Cir. 1978); *United States* v. *Finazzo*, 583 F.2d 837, 850 (6th Cir. 1978); *United States* v. *Ford*, 553 F.2d 146, 170 (D.C. Cir. 1977). But see *United States* v. *Barker*, 546 F.2d 940, 953 n.40 (D.C. Cir. 1976) (opinion of Wilkey, J.) ("if a trespass is not necessary in a particular case to effect an eavesdrop, the court need not gratuitously authorize a surreptitious entry; but few would question a court's power to do so in those cases in which it is required"). In a brief dissent from the denial of en banc review in *United States* v. *Agrusa*, *supra*, four judges of the Eighth Circuit stated that they "entertain great doubt of the validity of a judicial order which authorizes" surreptitious entries to install eavesdropping devices. 541 F.2d at 704.

the listening devices needed to execute a court's eavesdropping order.

Moreover, any constitutional requirement of notice (a subject nowhere mentioned in the text of the Fourth Amendment) is satisfied in this case by the post-seizure notice afforded under Title III. The contention that the Constitution absolutely prohibits deferral of notice of a search or entry, even when such deferral is indispensable to the successful execution of the search, cannot withstand analysis.

A. Electronic Eavesdropping is Constitutionally Permissible

Prior to the decision in *Katz* v. *United States*, 389 U.S. 347 (1967), this Court had held that eavesdropping would be deemed a "search" for Fourth Amendment purposes only if it involved an unlawful trespass. *Silverman* v. *United States*, 365 U.S. 505 (1961); *On Lee* v. *United States*, 343 U.S. 747 (1952); *Goldman* v. *United States*, 316 U.S. 129 (1942); *Olmstead* v. *United States*, 277 U.S. 438 (1928). In each of these cases, the government had used some device to overhear the defendant's conversations, but the Court held the Fourth Amendment inapplicable unless there had been an unauthorized physical intrusion into private premises to conduct the eavesdropping. In none of these cases did the police obtain a warrant to conduct the eavesdropping.[4]

---

[4] In *Silverman* the Court noted that the intrusion was "unauthorized" (365 U.S. at 509), and it observed that the Court had never authorized police intrusions into a home or office

Berger v. *New York*, 388 U.S. 41 (1967), cast serious doubt on the continued decisiveness of the distinction between trespassory and non-trespassory intrusions. The Court in that case held unconstitutional on its face a New York statute that permitted non-consensual wiretapping and eavesdropping, with or without physical intrusions. Although the New York procedure required court authorization for electronic surveillance, the Court held that the procedure nonetheless was inadequate in various respects to meet Fourth Amendment standards.

Finally, in *Katz* v. *United States*, *supra*, the Court rejected the proposition that the Fourth Amendment is inapplicable to searches not involving physical intrusions into private premises. Instead, the Court held that whether electronic surveillance constitutes a "search" depends upon reasonable expectations of privacy with respect to the communications seized rather than whether there has been a physical intrusion into an area in which the defendant has a traditional property interest.

---

for the purpose of eavesdropping "without [a] warrant" (*id.* at 512). Similarly, in *Irvine* v. *California*, 347 U.S. 128 (1954), the Court noted that the police entries to install listening devices in the defendant's home were trespassory because they occurred "without a search warrant or other process" (347 U.S. at 132). In *Goldman*, Mr. Justice Murphy dissented on the ground that the eavesdropping in that case constituted a search, but he expressly noted that a warrant could have been devised to permit that kind of intrusion. 316 U.S. at 140 & n.7. See also *On Lee* v. *United States*, *supra*, 343 U.S. at 765-767 (Burton, J., dissenting); *Lopez* v. *United States*, 373 U.S. 427, 464 (1963) (Brennan, J., dissenting).

The agents in *Katz* attached a listening device to the outside of a telephone booth the defendant was using and thereby overheard his portion of several incriminating telephone conversations. Under the Fourth Amendment analysis adopted by the Court in *Katz*, the evidence obtained from the use of the listening device was thus the product of a search. Significantly, however, the Court did not rule that evidence obtained by an eavesdropping "search" is always inadmissible. Instead, it held that the evidence had to be suppressed solely because the law enforcement agents had not obtained court authorization for the eavesdropping. 389 U.S. at 356-357, 359. Citing its decisions in *Osborn* v. *United States*, 385 U.S. 323 (1966), and *Berger* v. *New York*, *supra*, the Court ruled that properly authorized electronic surveillance would be permissible. 389 U.S. at 355-356. Indeed, it specifically stated that the surveillance of Katz's conversations would have been lawful if judicial authorization for the surveillance had been obtained. 389 U.S. at 354.

B. Title III Provides a Scheme for Electronic Eavesdropping that Meets Constitutional Standards

Following this Court's decisions in *Berger* and *Katz*, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197. Title III of that Act establishes a detailed scheme for judicial authorization of interceptions of wire and oral communications. The provisions closely track this Court's analysis in *Berger*

in an effort to overcome the various constitutional infirmities that the Court had found in the New York electronic surveillance statute. See *Scott* v. *United States*, 436 U.S. 128, 130 (1978); *United States* v. *United States District Court*, 407 U.S. 297, 302 (1972).

Title III satisfies each of the constitutional objections that the Court had raised with respect to the New York statute. The statute permits interception of wire and oral communications only in limited circumstances and only pursuant to court authorization. See 18 U.S.C. 2511. Authorization may be granted only upon a detailed showing and a finding by the court that there is probable cause to believe that an individual is engaged in one of the offenses for which electronic surveillance is permitted (18 U.S.C. 2518 (3)(a)), that particular communications concerning that offense will be obtained through the interception (18 U.S.C. 2518(3)(b)), and that the wire or location at which the interception is to take place is being used in connection with the commission of the offense (18 U.S.C. 2518(3)(d)).[5] The statute also requires that the interception order identify with particularity the persons, if known, whose communications are to be intercepted (18 U.S.C. 2518(4)(a)), describe the facilities or place as to which the authority to intercept is being granted (18 U.S.C. 2518(4)(b)), and specify the type of communication

[5] These stringent probable cause requirements meet the Court's concern that the New York statute's "reasonable cause" standard was too lax. See 388 U.S. at 54-55.

being sought and the offense to which it relates (18 U.S.C. 2518(4)(c)).[6]

The statute further requires that the officers execute the order quickly, maintain the interception for only a limited period of time, and make a timely return on the eavesdropping order showing what was seized. 18 U.S.C. 2518(5), 2518(8)(a).[7] Moreover, the statute requires a showing by the applicant and a finding by the court that other investigative methods have been tried and have failed or reasonably appear to be unlikely to succeed or too dangerous to attempt. 18 U.S.C. 2518(1)(c), 2518(3)(c).[8]

Finally, the statute provides that the persons named in the order shall be served with an inventory within a reasonable time after the interception is authorized, giving notice of the order or application, the disposition of the application, and whether communications were intercepted. 18 U.S.C. 2518(8)(d). See *United States* v. *Donovan*, 429 U.S. 413, 428-432 (1977).[9]

---

[6] These provisions are responsive to the Court's objection that the New York procedure contained no requirement that the place to be searched and the things to be seized be particularly described. See 388 U.S. at 56-59.

[7] The New York statute was criticized for its failure to contain any such provisions. 388 U.S. at 59-60.

[8] This provision was designed to respond to the Court's observation that the New York statute permitted "unconsented entry without any showing of exigent circumstances." 388 U.S. at 60.

[9] This provision was addressed to the Court's observation that the New York statute contained no provision for notice to the person whose communications were overheard. 388 U.S. at 60.

In light of the close controls imposed by the statute and its careful attention to the constitutional concerns voiced by the Court in *Berger*, every court of appeals that has ruled on the issue has held that Title III is constitutional. See, *e.g.*, *United States* v. *Turner*, 528 F.2d 143, 158-159 (9th Cir. 1975); *United States* v. *Sklaroff*, 506 F.2d 837, 840 (5th Cir. 1975); *United States* v. *Ramsey*, 503 F.2d 524, 526 (7th Cir. 1974), cert. denied, 420 U.S. 932 (1975); *United States* v. *O'Neill*, 497 F.2d 1020, 1026 (6th Cir. 1974); *United States* v. *James*, 494 F.2d 1007, 1013 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974); *United States* v. *Tortorello*, 480 F.2d 764, 775 (2d Cir.), cert. denied, 414 U.S. 866 (1973); *United States* v. *Bobo*, 477 F.2d 974, 981 (4th Cir. 1973); *United States* v. *Cafero*, 473 F.2d 489, 495-500 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974); *United States* v. *Cox*, 462 F.2d 1293 (8th Cir. 1972); *Cox* v. *United States*, 449 F.2d 679 (10th Cir. 1971).[10]

---

[10] This Court has never held that Title III is constitutional on its face, see *United States* v. *Kahn*, 415 U.S. 143, 150 (1974); *United States* v. *United States District Court*, 407 U.S. 297, 308 (1972), but on several occasions it has upheld the admission of evidence obtained under the authority of Title III despite constitutional challenge. See *Scott* v. *United States*, *supra*; *United States* v. *Donovan*, 429 U.S. 413 (1977); *United States* v. *Chavez*, 416 U.S. 562 (1974); *United States* v. *Kahn*, *supra*. Cf. *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 463-465 (1977).

C. The Fourth Amendment Permits Surreptitious Entries to Execute Eavesdropping Orders Issued In Compliance with Title III

Although petitioner acknowledges that Title III is "a careful response to the *Berger* and *Katz* holdings" (Br. 22), he contends that the statute fails to satisfy the constitutional objections raised in *Berger* in one critical respect. According to petitioner (Br. 23), Title III improperly permits unconsented entry without notice or a showing of exigency, a point that the Court noted in *Berger* as one of the infirmities of the New York statute. 388 U.S. at 60.

Petitioner's objection to the lack of prior or contemporaneous notice is disposed of by *Katz* v. *United States*, *supra*, and *United States* v. *Donovan*, *supra*. In *Katz*, the Court stated that the reasons for requiring notice prior to an entry or a seizure of evidence have no bearing in the context of electronic surveillance. 389 U.S. at 355 n.16. In the case of judicially authorized electronic surveillance, the court observed, the purposes that generally underlie the requirement of notice—avoiding the shock of unannounced police intrusion into the home and minimizing the danger to the police of an unannounced entry—do not apply. *Ibid.* The Court made the same point in *Donovan*, this time with express reference to Title III. Citing the portion of *Berger* on which petitioner relies and the portion of *Katz* referred to above, the Court held that the notice and return provisions in Title III, 18 U.S.C. 2518(8)(a), "satisfy constitutional requirements." *United States* v.

Donovan, *supra*, 429 U.S. at 429 n.19. The statute ensures that notice of the interceptions will be provided; it simply postpones the notice until after the interception.

Petitioner's objection that the statute lacks an adequate requirement that exigency be shown is also without merit. Title III expressly requires a showing of exigency before a wire or oral interception may be authorized. See 18 U.S.C. 2518(1)(c), 2518(3)(c). Prior to approving any electronic surveillance, the court must find that other investigative methods have been tried and have failed or are impracticable. These statutory provisions have uniformly been held to satisfy the objection in *Berger* that the New York statute permitted "unconsented entry without any showing of exigent circumstances" (388 U.S. at 60). See, *e.g.*, *United States* v. *Sklaroff*, *supra*, 506 F.2d at 840; *United States* v. *Bobo*, *supra*, 477 F.2d at 982; *United States* v. *Cafero*, *supra*, 473 F.2d at 498-501.

The broader contention that the Fourth Amendment does not permit entries onto private property to install eavesdropping devices under any circumstances is inconsistent with the Court's analysis in *Katz*, *Osborn*, and *Berger*, and with well-settled principles governing the execution of search warrants generally. Although the surveillance in *Katz* and *Osborn* did not involve physical trespasses, the rationale of those cases suggests that there should be no distinction for Fourth Amendment purposes between an intrusion by electronic surveillance from outside the physical

premises in question and electronic surveillance that involves an unconsented entry. The Court implicitly recognized this point in *Alderman* v. *United States*, 394 U.S. 165 (1969), when it observed that under the principles of *Silverman* and *Katz*, officers cannot enter a house to install a listening device if the intrusion is not made pursuant to a valid warrant. See also T. Taylor, *Two Studies in Constitutional Interpretation* 114 (1969).

Moreover, *Berger* itself involved a surreptitious entry to install an eavesdropping device, and the Court's opinion nowhere suggested that the intrusion to install the device was *per se* unreasonable. Instead, the Court held only that the New York warrant procedure was too broad to permit "a trespassory intrusion into a constitutionally protected area" (388 U.S. at 44). The Court was careful to point out that eavesdropping can be constitutionally permissible "under specific conditions and circumstances" (388 U.S. at 63). The Fourth Amendment, the Court observed, does not make the home or the office sanctuaries where the law can never reach, "but it does prescribe a constitutional standard that must be met before official invasion is permissible" (388 U.S. at 64).[11]

[11] Three members of the Court in *Berger* would have upheld the court-authorized intrusion and interception in that case. See 388 U.S. at 81 (Black, J., dissenting); *id.* at 94 (Harlan, J., dissenting); *id.* at 112 (White, J., dissenting). Mr. Justice Stewart, who concurred on a narrow ground, would not have struck down the New York statute, but, like the three dissenters, would have held that electronic eavesdropping under the authority of the New York statute would be constitutional

The law governing the execution of conventional search warrants is in accordance with this analysis. The courts have uniformly held that entries into unoccupied premises to undertake otherwise permissible searches are constitutional. *United States* v. *Brown*, 556 F.2d 304, 305 (5th Cir. 1977); *United States* v. *Agrusa*, *supra*, 541 F.2d at 698; *Payne* v. *United States*, 508 F.2d 1391, 1393-1394 (5th Cir.), cert. denied, 423 U.S. 933 (1975); *United States* v. *Gervato*, 474 F.2d 40 (3d Cir.), cert. denied, 414 U.S. 846 (1973).[12]

Although this Court has never expressly held that entries into unoccupied premises are constitutional, the Court's Fourth Amendment decisions are consistent with this principle. On numerous occasions when the Court has held that a warrant was required in order to make a valid search, the premises in question were vacant or the property unattended, either because of the arrest of the defendant

if an adequate showing of probable cause were made. *Id.* at 68 (Stewart, J. concurring in the result). Only Mr. Justice Douglas would have held electronic eavesdropping impermissible in all cases. *Id.* at 67 (Douglas, J., concurring).

[12] The rule in the state courts is the same. See, *e.g.*, *State* v. *Gutierrez*, 91 N.M. 542, 577 P.2d 440, 447-448 (1978); *Hart* v. *Superior Court*, 21 Cal. App. 3d 496, 502-504, 98 Cal. Rptr. 565, 569-571 (1971); *State* v. *Calvert*, 219 Tenn. 534, 410 S.W.2d 907 (1966); *State* v. *Williams*, 250 La. 64, 193 So. 2d 787 (1967); *Outlaw* v. *State*, 208 Miss. 13, 43 So. 2d 661 (1949); *State* v. *Robinson*, 354 Mo. 74, 188 S.W. 2d 664 (1945); *Thigpen* v. *State*, 51 Okla. Crim. 28, 299 P. 230 (1931); *People* v. *Law*, 55 Misc. 2d 1075 287 N.Y.S. 2d 565 (1968); *People* v. *Johnson*, 231 N.Y.S. 2d 689 (Sup. Ct. 1962); *State* v. *Dropolski*, 100 Vt. 259, 136 A. 835 (1927).

or for some other reason.[13] See, *e.g.*, *Mincey* v. *Arizona*, No. 77-5353 (June 21, 1978); *Michigan* v. *Tyler*, 436 U.S. 499 (1978); *Chapman* v. *United States*, 365 U.S. 610, 615 (1961); *Agnello* v. *United States*, 269 U.S. 20, 32-33 (1925). While some reference to the subject could be expected if petitioner's proposition were correct, these decisions contain no suggestion, explicit or implicit, that the target of the search or someone acting on the target's behalf would have to be present or have prior notice for the search to be constitutional.

Finally, even the common law rule governing entries to execute search warrants does not support petitioner's position. At common law, government officers executing a search warrant could not break into a private dwelling, absent exigent circumstances, without first announcing their identity and purpose. See *Miller* v. *United States*, 357 U.S. 301 (1958); Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. Pa. L. Rev. 499, 501-504 (1964). That rule has been codified in 18 U.S.C. 3109 and has been characterized as having constitutional overtones. See *Sabbath* v. *United States*, 391 U.S. 585, 591 n.8 (1968); *Ker* v. *California*, 374 U.S. 23, 49, 53 (opinion of Brennan,

[13] The Federal Rules of Criminal Procedure plainly contemplate that some valid warrant searches will take place when the premises searched are unoccupied. Rule 41(d) provides that a copy of the warrant and a receipt shall be given to the person from whose premises the property was taken "or [left] at the place from which the property was taken." Similarly, the inventory must be made in the presence of the persons from whose premises the property was taken "if they are present."

J.). The common law requirement of prior notice, however, does not aid petitioner here for several reasons. First, because forms of electronic surveillance were then unknown, the common law rule was designed solely with reference to conventional searches for tangible property already in existence. The costs to law enforcement of a rule of prior notice were properly perceived as minimal in that context. In the case of electronic surveillance, by contrast, prior notice would invariably destroy the purpose of the search. Thus, it is difficult to credit the view that the common law judges would have applied the requirement of prior notice if they had been faced with the problem of court-authorized electronic surveillance. Moreover, both the common law rule and 18 U.S.C. 3109 apply only to private dwellings.[14] Ac-

[14] At common law, no announcement was ever required prior to searching a building other than a home. See *Penton* v. *Brown*, 1 Keble 699, 83 Eng. Rep. 1193 (K.B. 1664); *Androscoggin R.R.* v. *Richards*, 41 Me. 233, 238 (1856); Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, *supra*, 112 U. Pa. L. Rev. at 501-504. Section 3109 is similarly limited to entries into dwellings and has no application to entries into other private property. See *United States* v. *Agrusa*, *supra*, 541 F.2d at 697, 699-700 & nn.21, 22 (collecting cases); *Fields* v. *United States*, 355 F.2d 543 (5th Cir.), cert. dismissed, 384 U.S. 935 (1966).

The courts have recognized an "exigent circumstances" exception to Section 3109. See, *e.g.*, *United States* v. *Carter*, 566 F.2d 1265, 1268 (5th Cir.), cert. denied, No. 78-1326 (1978); *United States* v. *Murrie*, 534 F.2d 695, 698 n.1 (6th Cir. 1976); *United States* v. *Smith*, 520 F.2d 74, 76-81 (D.C. Cir. 1975); *United States* v. *Bustamonte-Gomez*, 488 F.2d 4, 11 (9th Cir. 1973), cert. denied, 416 U.S. 970 (1974). See also *Sabbath* v. *United States*, *supra*, 391 U.S. at 591 n.8.

cordingly, neither the common law nor any statutory or constitutional rule of prior notice applies to the entry of this case into an unoccupied office building, in circumstances in which the giving of notice would have been fatal to the ability to execute the search.

II

DISTRICT COURTS HAVE STATUTORY POWER TO AUTHORIZE SURREPTITIOUS ENTRIES FOR THE PURPOSE OF INSTALLING ELECTRONIC EAVESDROPPING DEVICES

Petitioner contends (Br. 9-19) that, constitutional barriers aside, the district court lacked statutory authority to permit law enforcement officers to enter his office surreptitiously for the purpose of installing the electronic equipment necessary to achieve the judicially authorized interception of his oral communications. He bases this conclusion solely upon the absence of any express mention in Title III of covert entries to plant a "bug," urging that this silence on "an issue with such enormous public interest and political consequences" is "powerful evidence" (*id.* at 18) that Congress could not have intended to allow such entries.

It is not surprising, however, that Title III does not dwell on this subject. In the wake of this Court's decisions in *Berger* and *Katz*, which had restricted the availability of electronic surveillance as a law enforcement technique but had suggested that it would be possible to construct a statutory system that would satisfy the Fourth Amendment, Congress's overriding concern was the expeditious enactment

of legislation that would authorize the search and seizure, consistent with constitutional requirements, of a person's spoken words. See *United States* v. *United States District Court*, *supra*, 407 U.S. at 310 n.9. Hence, as the Court recently observed in *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 (1977) (emphasis added), "Title III is concerned *only* with orders 'authorizing or approving the interception of a wire or oral communication * * *,'" not with other, collateral types of intrusions (such as the unconsented entry onto private premises) that the Court had not condemned in *Berger* and *Katz* and that were adequately covered by other statutory provisions.

Rule 41(b) of the Federal Rules of Criminal Procedure empowers a district court to authorize law enforcement officers to enter private premises for the purpose of conducting a search and seizure. The rule applies, without qualification, to the search and seizure of both tangible and intangible objects (*United States* v. *New York Telephone Co.*, *supra*, 434 U.S. at 169), and petitioner has offered no reason why it would not similarly allow the issuance of a warrant authorizing an entry for the purpose of planting an electronic listening device.[15] See, *e.g.*,

---

[15] Two courts of appeals have concluded that a district court is without statutory power to authorize an entry onto private premises in order to install an electronic eavesdropping device. However, the Sixth Circuit in *United States* v. *Finazzo*, *supra*, did not consider the applicability of Rule 41 (but see 583 F.2d at 582 (Celebreeze, J., concurring) ("federal district courts gain sufficient ancillary power from Rule 41 and the All Writs Act to order surreptitious entry to implement such in-

Silverman v. *United States*, *supra*, 365 U.S. at 512; *id.* at 513 (Douglas, J., concurring) (conviction based on trespassory electronic eavesdropping evidence must be reversed "since no search warrant was obtained as required by the Fourth Amendment and Rule 41 * * *."). Moreover, 18 U.S.C. 3109 provides that a law enforcement officer "may break open any outer or inner door or window of a house * * * to execute a search warrant" issued pursuant to lawful authority.[16]

---

terceptions wholly apart from the power to authorize such entry which exists in Title III itself")), while the Ninth Circuit in *United States* v. *Santora*, *supra*, found Rule 41 irrelevant only because "the rule does not apply to the issuance of intercept orders" (583 F.2d at 464 n.10). This objection is beside the point. Of course Rule 41 was not designed to empower a court to authorize electronic surveillance; Congress enacted the detailed provisions of Title III for precisely that purpose. The fact that Rule 41 does not itself authorize eavesdropping is no answer to the contention that the rule permits a court to authorize a search, such as the entry to install a listening device, that does not itself constitute an interception of communications. Such entries are indistinguishable from the entries onto private property, concededly within the scope of Rule 41, that regularly precede the search for and seizure of books, contraband, or other tangible evidence of criminal activity.

[16] Although Section 3109 requires the police officer to give "notice of his authority and purpose," the Court has recognized, in the context of electronic surveillance, "that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence." *Katz* v. *United States*, *supra*, 389 U.S. at 355 n.16. See *Berger* v. *New York*, *supra*, 388 U.S. at 60; *Osborn* v. *United States*, *supra*, 385 U.S. at 328-330; *Ker* v. *California*, *supra*, 374 U.S. at 37-41; *United States* v. *Agrusa*, *supra*, 541

There is not the slightest hint in either the detailed statutory language or the extensive legislative history of Title III that Congress intended to abrogate this established grant of authority. To begin with, although Congress had no need to address the question of surreptitious entries in Title III, it unquestionably was aware during its consideration of the statute that, while the interception of wire communications was typically accomplished by means of an outside connection with a telephone line (see *Berger* v. *New York*, *supra*, 388 U.S. at 46), electronic eavesdropping traditionally required the secret placement of a listening device in the area where the conversations were expected to occur.

Congress was informed by both advocates and opponents of electronic surveillance legislation dealing with "bugging" that covert entries were often necessary in the course of installation. For example, Professor Blakey, who favored the enactment of legislation authorizing electronic eavesdropping and was the principal draftsman of Title III, cautioned that "[i]t is often difficult if not impossible to install [eavesdropping devices] safely where a surreptitious entry is required. * * * Like a thief in the night, the officer must secretly enter to install the bug." Blakey, *Aspects of the Evidence Gathering Process in Or-*

F.2d at 699-701. See also 114 Cong. Rec. 13208 (1968); McNamara, *The Problem of Surreptitious Entry to Effectuate Electronic Eavesdrops: How Do You Proceed After the Court Says "Yes"?*, 15 Am. Crim. L. Rev. 1, 31 n.97 (1977); Note, *The Supreme Court, 1967 Term*, 82 Harv. L. Rev. 63, 194 (1968).

ganized Crime Cases, reprinted in the President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime*, App. C at 92, 97 (1967). Other persons recommended that, in light of these problems, the proposed legislation be limited to types of electronic surveillance that would not require a trespass. See, *e.g.*, *Anti-Crime Program: Hearings on H.R. 5037, etc. Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 937 (1967). The congressional hearings contain repeated references by knowledgeable witnesses to the necessity for secret entries onto private premises in connection with electronic eavesdropping. See, *e.g.*, *Hearings on Invasions of Privacy Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 973, 997-998, 1007, 1011-1012, 1225-1226, 1249-1250, 1252, 1517-1518, 1702, 1704-1705, 1731-1732, 1954, 2339-2340, 2379-2380 (1966).

Perhaps more important, this Court's decisions involving the interception of oral communications, which were studied closely by Congress and cited time and again during the legislative hearings and floor debates and in the committee reports, had alluded on a number of occasions to the need for covert entries. See *Silverman* v. *United States*, *supra*, 365 U.S. at 510; *Lopez* v. *United States*, *supra*, 373 U.S. at 467 n.15 (1963) (Brennan, J., dissenting); *Irvine* v. *California*, *supra*, 347 U.S. at 130-132. Indeed, as we noted earlier, the electronic eavesdropping provisions of Title III were drafted in direct response to the

decision in *Berger* v. *New York*, *supra*, which had involved a surreptitious entry onto business premises for the purpose of installing a listening device. 388 U.S. at 44, 45; *id.* at 64-65, 67 (Douglas, J., concurring). See *United States* v. *United States District Court*, *supra*, 407 U.S. at 302.

The legislative history is also marked by statements by legislators themselves indicating recognition of the need for surreptitious entries. Senator Morse, an opponent of Title III who feared that its eavesdropping provisions would result in the indiscriminate invasion of individual privacy, remarked (114 Cong. Rec. 11598 (1968)):

> I know that elaborate efforts are made to distinguish between a real wiretap, or bug, which requires someone to intrude upon private premises to install. That kind of invasion is truly a search, requiring a warrant under conditions set forth in article 4. But electronic surveillance, whereby conversations can be picked up from scores of feet away, without any physical intrusion upon the premises involved, is a far more insidious invasion of privacy, and one which I do not believe should be tolerated at all.

Senator Tydings, a supporter of the bill, responded by contending that there was no reason to fear that traditional investigative techniques would be wholly dispensed with in favor of electronic surveillance, partly because (114 Cong. Rec. 12989 (1968)):

> [Electronic] surveillance is very difficult to use. Tape [*sic*] must be installed on telephones, and wires strung. Bugs are difficult to install in

> many places since surreptitious entry is often impossible. Often, more than one entry is necessary to adjust equipment.

See also 114 Cong. Rec. 14709-14710, 14732-14734 (1968); S. Rep. No. 1097, 90th Cong., 2d Sess. 67-68, 102-103 (1968); *Anti-Crime Program: Hearings on H.R. 5037, etc. Before the Subcomm. No. 5 of the House Comm. on the Judiciary, supra*, at 1031.

Senator Tydings also referred during the debates to testimony before a Senate subcommittee concerning highly incriminating oral communications that had been intercepted by the FBI through use of a bugging device placed in the office of an organized crime figure. See *Controlling Crime Through More Effective Law Enforcement: Hearings on S. 300, etc. Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 937-954, 998 (1967). The device had been installed by trespassory means but without a warrant, and the evidence obtained was therefore inadmissible in court. See *id.* at 970-971. Senator Tydings assured his colleagues that electronic eavesdropping accomplished in this manner but in compliance with the provisions of Title III requiring advance judicial authorization would have produced a different result (114 Cong. Rec. 12986 (1968)):

> Under the bill [now] before us, with a proper showing of probable cause and close judicial supervision, this surveillance could have been used to indict and convict [the target of the surveillance]. That he cannot be held responsible for all his criminal activities, with all that we know, is incredible.

Despite this clear congressional awareness of the necessity for covert entries in order to carry out judicially authorized eavesdropping approved by the statute, nothing in Title III suggests that such techniques henceforth were to be prohibited. The most logical conclusion to be drawn from Congress' failure to address the matter in the statute is that it assumed that the normal methods of effectuating electronic surveillance of oral communications were already authorized and would continue.[17] It bears repeating that Title III was a response to court decisions that had declared unconstitutional the procedures followed in employing several investigative tools that had proven quite valuable to law enforcement efforts, especially against organized crime. "The major purpose of title III," as the Senate Report explained, "is to combat organized crime" (S. Rep. No. 1097, *supra*, at 70), and accordingly Congress had little incentive to circumscribe those efforts more narrowly than was constitutionally necessary. See

---

[17] In its comment on the statutory definition of "oral communication," for example, the Senate Report cited *Silverman* and *Berger* and noted that Title III was intended merely to reflect existing law. S. Rep. No. 1097, *supra*, at 89-90. Although the American Bar Association also has recognized that surreptitious entry must accompany the installation of most bugging devices (ABA Standards for Criminal Justice, *Electronic Surveillance*, General Commentary, at 45, 65 n. 175, 91-92; Commentary on Specific Standards, at 139-140, 149; Appendix D, at 209 (Approved Draft 1971)), it too has not adopted a specific surreptitious entry provision in either the Tentative Draft of 1968 or the Approved Draft of 1971. Compare §§ 5.7-5.8, at 8 in the Standards of the Tentative Draft with §§ 5.7-5.8, at 18-19 of the Proposed Final Draft of Standards.

United States v. *Kahn*, *supra*, 415 U.S. at 151. Instead, the statute was viewed as "[l]egislation meeting the constitutional standards set out in the [*Berger* and *Katz*] decisions, and granting law enforcement officers the authority to tap telephone wires and install electronic surveillance devices in the investigation of major crimes and upon obtaining a court order" (S. Rep. No. 1097, *supra*, at 75).

Indeed, contrary to petitioner's assertion (Br. 17) that Title III is utterly silent on the matter, there are a number of indications in the statute that Congress expected that law enforcement officers would have to engage in surreptitious entries. First, Title III is specifically directed to the interception of both "wire" and "oral" communications (18 U.S.C. 2518 (1)), and there can be no serious dispute that the latter type of interception frequently entails the placement of a "bug."[18] Second, Congress broadly

[18] Title III is the product of two bills. The first (S. 675, 90th Cong., 1st Sess. (1967)) was introduced by Senator McClellan in January 1967, five months prior to the Court's decision in *Berger*. See S. Rep. No. 1097, *supra*, at 225. That bill proposed to prohibit wiretapping by persons other than duly authorized law enforcement officers acting pursuant to court order but did not attempt to legislate with respect to electronic eavesdropping. At the time the McClellan bill was introduced, federal law proscribed all private and governmental wiretapping. By contrast, "bugging" was constitutionally and statutorily permissible so long as it did not entail a warrantless physical trespass onto private property.

S. 675 would have left the pre-*Berger* law on "bugging" unchanged. Two weeks after the decision in *Berger*, however, Senator Hruska, who had co-sponsored S. 675, introduced a second bill, S. 2050, 90th Cong., 1st Sess. (1967) (see 113 Cong. Rec. 18007 (1967)), which was "tailored to meet the constitutional requirements imposed by that decision." S. Rep. No. 1097, *supra*, at 224. This second bill, which applied to electronic eavesdrops as well as to wiretaps (see 114 Cong. Rec. 13209 (1968)), was eventually enacted, with modifications following the decision in *Katz*, as Title III. See *United States* v. *Donovan*, *supra*, 429 U.S. at 426. Senator Hruska's statements during the legislative hearings leave no doubt that S. 2050 was intended to authorize the interception of oral communications, subject to the Fourth Amendment requirements outlined in *Berger*. See *Controlling Crime Through More Effective Law Enforcement: Hearings on S. 300, etc. Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, *supra*, at 11.

As petitioner notes (Br. 17-18), the Ninth Circuit has gleaned from this history that "[t]here is not the slightest suggestion in Senator Hruska's remarks to indicate any intent on his part to overturn the long-established *Silverman* doctrine that evidence obtained by trespassory bugging was inadmissible as a violation of the Fourth Amendment." *United States* v. *Santora*, *supra*, 583 F.2d at 459. But, as we have discussed above (see pages 20-21 and note 4, *supra*), *Silverman* held only that *warrantless* trespasses to plant a bug were contrary to the Fourth Amendment. It was the absence of a warrant, rather than the surreptitious entry, that offended the Constitution, and Title III was plainly designed to remedy that defect by requiring judicial authorization before law enforcement officers could engage in any form of nonconsensual electronic surveillance. See *Silverman* v. *United States*, *supra*, 365 U.S. at 512 ("a federal officer may [not] *without warrant* and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard") (emphasis added); *United States* v. *Agrusa*, *supra*, 541 F.2d at 696 n.12.

defined "electronic, mechanical, or other [surveillance] device" to mean "*any* device or apparatus which can be used to intercept a wire or oral communication" (18 U.S.C. 2510(5); emphasis added), thus plainly including listening devices, such as

"bugs," that in the vast majority of instances require covert installation within enclosed private areas. Third, the statute requires that the interception application and order contain a "full and complete statement * * * including * * * a particular description of the nature and location of the facilities from which *or the place where* the communication is to be intercepted * * *." 18 U.S.C. 2518 (1)(b)(ii) (emphasis added); see also 18 U.S.C. 2518(3)(d), (4)(b). Finally, 18 U.S.C. 2518(4) specifically authorizes a court, upon request of a law enforcement officer, to direct private citizens, including a "*landlord*, custodian or other person," to "furnish [the officer] all information, facilities, and technical assistance necessary to *accomplish the interception unobtrusively*" (emphasis added).[19] These provisions, as the Fourth Circuit has observed, "at least inferentially, support[] the * * * position that Congress intended to approve covert entry as a permissible concomitant of judicially-sanctioned eavesdropping." *Application of United States, supra*, 563 F.2d

[19] See *Electronic Surveillance, supra*, at 81. The language of Section 2518(4), as Judge Celebrezze observed in *United States* v. *Finazzo, supra*, 583 F.2d at 851, "apparently authorizes furtive placement of listening devices by gaining access to telephone lines, by using an apartment master key, or by other similar ploys. It is anomalous to hold that the statute does not authorize the entry involved in this case (through an unlocked window) when it plainly authorizes such an entry when facilitated by a landlord or custodian." Acceptance of petitioner's argument, he noted, "could make the result in a given case turn on the fortuity of whether one is an owner of his premises or a tenant or whether one employs custodians or not" (*ibid.*).

at 642. Accord, *United States* v. *Scafidi, supra*, 564 F.2d at 639; *United States* v. *Ford*, 414 F. Supp. 879, 883 (D. D.C.), aff'd, 553 F.2d 146 (D.C. Cir. 1977); *United States* v. *Volpe*, 430 F. Supp. 931, 932-934 (D. Conn. 1977), aff'd, No. 77-1311 (2d Cir. Aug. 7, 1978), petition for a writ of certiorari pending, No. 78-385.

In sum, given the documented history of Title III "replete with references to the evils of organized crime and the pressing need to apprehend its perpetrators through the interception of their communications" (*Application of United States, supra*, 563 F.2d at 642), the strong evidence that Congress was well aware that the interception of oral communications is often accomplished by means of a "bugging" device surreptitiously placed in the target premises, and the unmistakable indications in the statute itself that Congress nonetheless intended to authorize electronic eavesdropping in appropriate circumstances and, when necessary, to require persons such as landlords to assist in the eavesdropping, it would "imput[e] to [Congress] a self-defeating, if not disingenuous purpose" (*Nardone* v. *United States*, 308 U.S. 338, 341 (1939)) to conclude that Title III was meant, without saying so, to forbid law enforcement officers from utilizing a proven, constitutional investigative technique essential to the success of a great many oral interceptions.[20] The

[20] See *United States* v. *New York Telephone Co., supra*, 434 U.S. at 170 ("we could not hold that the District Court lacked any power to authorize the use of pen registers without defying the congressional judgment that the use of pen registers 'be permissible' ").

available evidence surely fails to indicate any "congressional intent to open such a loophole in Title III." *Application of United States, supra,* 563 F.2d at 643.

III

THE ENTRY ONTO PETITIONER'S BUSINESS PREMISES TO INSTALL A LISTENING DEVICE WAS LAWFUL EVEN THOUGH THE DISTRICT COURT DID NOT SEPARATELY AND EXPRESSLY AUTHORIZE THE ENTRY IN ADVANCE

While a telephone wiretap can often be installed from outside the target's premises, installation of an electronic eavesdropping device ordinarily requires a surreptitious entry into the area where the oral communications are to take place. See *Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (Electronic Surveillance)* 43-44 (1976). Partly for this reason, requests for eavesdropping orders are much less common than requests for wiretap orders. In 1977, for example, federal and state agents obtained a total of only 45 eavesdropping orders, while in the same year courts issued a total of 554 wire interception orders. Administrative Office of the United States Courts, *Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications for the Period January 1, 1977 to December 31, 1977* xiv (1978).[21]

[21] The total number of oral interception orders entered each year has fallen to the present level from a high of 80 in 1973. In that year 731 telephone wiretap authorization orders were entered. See *Electronic Surveillance, supra,* at 269. See also Administrative Office of the United States Courts, *Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications for the Period January 1, 1976 to December 31, 1976* xvi (1977); Administrative Office of the United States Courts, *Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications for the Period January 1, 1975 to December 31, 1975* xiv (1976).

We have been informed by the FBI that, when it is feasible, agents employ ruses to obtain access to premises where the courts have authorized oral interceptions in order to install the necessary eavesdropping equipment. A bomb scare ruse, for example, was used in *United States* v. *Ford, supra.* Usually, however, such techniques are not feasible, and a covert entry must be made.[22] See *Electronic Surveillance, supra,* at 15, 43. Moreover, it is almost never possible to conduct electronic eavesdropping without some kind of physical intrusion into the target premises. The "Buck Rogers" type of equipment designed to overhear conversations in a closed room without the necessity of a physical intrusion is simply not reliable enough at present to be of any real

[22] The court of appeals in *Ford* stated that the term "surreptitious entry" encompasses both entries by ruse or stratagem and covert entries (553 F.2d at 154 n.32), and it held that there is no difference between ruse entries and covert entries for Fourth Amendment purposes (*id.* at 155 n.35). While we have reservations about the soundness of this equation of ruse entries with covert entries (cf. *Sabbath* v. *United States, supra,* 391 U.S. at 590 n.7; *Lewis* v. *United States,* 385 U.S. 206 (1966)), the Court need not reach this issue here, since in this case the entry was covert.

use in carrying out oral interception orders. *Electronic Surveillance, supra,* at 44. National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, *Commission Studies, State of the Art of Electronic Surveillance* 171-172, 179-182 (1976).

Petitioner nonetheless contends (Br. at 25-29) that, although the district court authorized the interception of oral communications in his office, his conviction should be overturned because the court did not separately and expressly authorize the entry necessary to install the eavesdropping device. We submit that there is no statutory or constitutional requirement that the entry be separately authorized, so long as the entry is essential to effectuate the authorized interception and is accomplished in a reasonable manner.

Title III itself imposes no requirement that a district court separately approve the entry to install an eavesdropping device. As we have discussed, the legislative history of the statute plainly shows that Congress was aware that on-site electronic surveillance would ordinarily require covert trespassory installation. The 1970 amendments [23] provide further support for this view. They authorize the court to require a landlord or custodian, among others, to

[23] Congress amended Sections 2511(2)(a), 2518(4), and 2520 of Title III as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 654. All three amendments related to the authority of the court to order third parties to cooperate with government agents seeking to execute a surveillance order.

furnish the applicant with facilities and equipment to accomplish the interception "unobtrusively," demonstrating that Congress contemplated that such "unobtrusive" entries would often be necessary. As Judge Gurfein pointed out in his concurring opinion in *United States* v. *Scafidi, supra,* 564 F.2d at 643, this provision is intended for the benefit of the applicant: a "cooperation order" is incorporated in the surveillance order only "upon request of the applicant." Thus, if the agent can obtain the necessary cooperation on his own, or if no such cooperation is necessary to install the listening device, the order authorizing the surveillance need not specially address the mode of installation.

Since the statute does not require a separate authorization for entry, petitioner's claim turns solely on the Fourth Amendment. Under Fourth Amendment analysis, the absence of separate authorization for the entry is not fatal to the surveillance order. The order in this case authorized a search and seizure of particular types of conversations in a specified place; this satisfied the constitutional requirement that a warrant "particularly describ[e] the place to be searched, and the person or things to be seized." The order was issued by a neutral judicial officer upon a sworn statement and after a judicial finding of probable cause that petitioner was engaged in criminal activity, that the activity was being carried out in the place to be searched, and that the conversations to be seized would contain evidence of the criminal activity under investigation. The order thus

satisfied the constitutional requirement that a warrant issue only "upon probable cause, supported by Oath or affirmation." Hence, the order met each of the requirements of the Warrant Clause of the Fourth Amendment. Only if the search was unreasonable and thus in violation of the reasonableness clause of the Amendment would the Constitution be offended and the exclusion of the evidence seized be appropriate.

The Fourth Amendment, of course, protects against unreasonable methods of executing warrants, just as it protects against unreasonable methods of executing otherwise permissible warrantless searches. See *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 559-560 (1978); *Marron* v. *United States*, 275 U.S. 192 (1927); cf. *Ker* v. *California*, *supra*. Accordingly, if there were reasonable methods short of a trespassory entry by which to intercept the oral communications that were the subject of the order, or if the law enforcement agents had used unreasonable means of gaining entry to install the listening device, the constitutionality of the search might properly be questioned. Similarly, if the agents had departed from their task of installing the listening device and had searched for and seized physical evidence inside the building, that evidence would be excludable as the product of an unlawful departure from the course required to execute the warrant. See *Stanley* v. *Georgia*, 394 U.S. 557, 571-572 (1969) (Stewart, J., concurring in the result). But in this case the district court specifically found that "the safest and

most successful method of accomplishing the installation of the [eavesdropping] device was through breaking and entering the premises in question" (Pet. App. 17a). The court of appeals accepted the district court's findings that "a surreptitious entry was the most effective means for installing the interception device" and that "the installation was based upon probable cause and executed in a reasonable fashion" (*id* at 7a). Thus, because the agents conducted the oral interceptions with a proper warrant and because the means of executing the warrant were reasonable, the subsequent seizure of petitioner's conversations was entirely consistent with Fourth Amendment principles.

Although the Second and Third Circuits have agreed with this analysis (Pet. App. 7a-8a; *United States* v. *Scafidi*, *supra*, 564 F.2d at 639-640), the Fourth and District of Columbia Circuits have taken a contrary position. See *Application of United States*, *supra*, 563 F.2d at 644; *United States* v. *Ford*, *supra*, 553 F.2d at 152-165.[24] In the view of the latter courts,

---

[24] The Eighth Circuit in *United States* v. *Agrusa*, *supra*, 541 F.2d at 696 n.13, declined to reach the question whether the entry would have to have separate express judicial authorization in order for the intercepted conversations to be admissible in evidence. The surveillance order in that case included an express authorization for surreptitious entry. 541 F.2d at 693. In *United States* v. *Finazzo*, *supra*, the Sixth Circuit held that there was no statutory authority for surreptitious entry and therefore did not reach the question whether the absence of a separate entry authorization would be enough to require suppression of the intercepted communications. In his concurring opinion, however, Judge Celebrezze stated his view that a separate authorization for entry was required.

the entry to install the eavesdropping device and the interception of oral communications implicate two discrete privacy interests and thus require two distinct authorizations. But this analysis is unduly rigid. To require that a court include separate, express authorization for each privacy interest that is affected by a particular governmental intrusion would be inconsistent with the warrant procedure as it is employed in other contexts and would afford little if any meaningful additional protection for individual privacy interests.

The main purpose of a warrant is to "interpose[] a magistrate between the citizen and the police * * * so that an objective mind might weigh the need to invade [the individual's] privacy in order to enforce the law." *McDonald* v. *United States*, 335 U.S. 451, 455 (1948). Accordingly, if the scope of the competing privacy and law enforcement interests is reasonably clear at the time the magistrate issues the warrant, the purpose of the warrant procedure is served. It would be unnecessarily cumbersome to require the magistrate to list and expressly authorize each potential invasion of some privacy interest that could be implicated in the course of executing the warrant.

This analysis accords with the practice followed in the case of conventional warrants authorizing the search for and seizure of physical evidence. Traditionally, the intrusion sanctioned by such warrants has been considered a single invasion of privacy for Fourth Amendment purposes, even though the intrusion implicates both the target's interest in the private uninterrupted enjoyment of the property seized and his interest in the privacy of the premises in which the property is located. As the Court noted in *Boyd* v. *United States*, 116 U.S. 616, 622 (1886), the entry to effect a search and seizure is but "[an] aggravating incident[] of actual search and seizure." Thus, the entry necessary to accomplish a search and seizure ordered by a conventional warrant is not regarded as a separate intrusion requiring separate, explicit judicial authorization. See Fed. R. Crim. P., Appendix of Forms, Form 15. Rather, the warrant's express directive to search a described place for specified items is deemed to carry with it the implicit authority to utilize reasonable means to execute the search, including forcible breaking and entry into the premises, if necessary.

The law governing arrests pursuant to valid arrest warrants provides further support for this analysis. The courts are in agreement that when an officer has a valid arrest warrant and probable cause to believe the subject of the warrant is at home, he may enter the subject's home without the need of a search warrant or other authorization for the entry. See *United States* v. *Cravero*, 545 F.2d 406, 421 (5th Cir. 1976) (on petition for rehearing), cert. denied, 429 U.S. 1100 (1977); *United States* v. *Brown*, 467 F.2d 419, 423 (D.C. Cir. 1972); cf. *Sabbath* v. *United States*, *supra*.[25] The entry into the home invades an

[25] In holding that 18 U.S.C. 3109 applies to the execution of arrest warrants as well as search warrants, the Court in *Sabbath* implicitly approved entries into homes under the

arguably separate Fourth Amendment interest from the interest affected by the arrest itself, but the courts have regarded the arrest warrant as sufficient to override both interests.[26] Thus, if the search or seizure is authorized, the incidental invasion of other Fourth Amendment interests does not require separate authorization, at least where it appears likely at the time of the authorization that the incidental intrusion will be necessary.

Support for this analysis can also be found in the recently enacted Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783. Section 105(b) provides that an order approving electronic surveillance under the Act must specify, among other things, "the means by which the electronic surveillance will be effected and whether physical entry will be used to effect the surveillance." Section 105(b)(1)(D). Significantly, the legislative history of the Act notes that the requirement that the surveil-

---

authority of arrest warrants, while holding that notice would ordinarily be required before entering, absent exigent circumstances.

[26] The courts of appeals are split on the question whether an entry can be made into a third party's home to arrest the subject of a warrant, without a separate authorization for the entry. Compare *United States* v. *Cravero, supra; United States* v. *McKinney*, 379 F.2d 259, 262-263 (6th Cir. 1967); and *United States* v. *Brown, supra*, with *Government of the Virgin Islands* v. *Gereau*, 502 F.2d 914, 928-930 (3d Cir. 1974). The somewhat different question of the validity of an entry to make an arrest without any kind of warrant is now before the Court in *Payton* v. *New York*, No. 77-5420.

lance order specify the place or facilities against which the surveillance is directed and the type of information sought is "designed to satisfy the Fourth Amendment's requirements that warrants describe with particularity and specificity the person, place, and objects to be searched or seized." S. Rep. No. 95-601, 95th Cong., 2d Sess. 49 (1978). The requirement that the mode of installation be specified, however, was said to be "in addition to the Fourth Amendment's requirements" (*ibid.*). Thus, although the statute included the requirement, not present in Title III, that the mode of entry be specified in the order, that provision was recognized by Congress to be statutory, not constitutional, in scope.

Application of this analysis to the present case leads to the conclusion that separate, express language in the order authorizing entry to install the listening device was not constitutionally required. As we have noted, the legislative history of Title III shows that Congress was well aware that covert entries would ordinarily be required to execute an eavesdropping order. Moreover, as is evident from the description of the premises contained in the eavesdropping application at issue here (see Pet. App. 17a-18a), "a surreptitious entry was within contemplation" (*id.* at 6a) when the order was issued. Accordingly, just as a conventional warrant is deemed to contain implicit authorization to use such means as are reasonably necessary to execute the search and seizure it commands, so the authorization to intercept the conversations in this case must

reasonably be interpreted as providing "concomitant authorization for agents to covertly enter the premises in question and install the necessary equipment" (*id.* at 18a). To hold otherwise is to assume that the authorizing judge engaged in the pointless exercise of ordering the agents to intercept certain conversations at petitioner's place of business while withholding from them the means of carrying out his order.

Our contention that the eavesdropping order in this case implicitly authorized the surreptitious entry necessary to implement it is a limited one. We are not suggesting that it would be constitutionally reasonable or implicitly authorized for agents to use a covert entry technique in any case in which the interception could be accomplished by less intrusive means, nor are we suggesting that re-entries for the purpose of improving the quality of the interceptions would not require specific judicial consideration and authorization. Compare *United States* v. *Ford*, *supra*.[27] We simply contend that in a case like this one, where there has been only a single entry to install the electronic listening device, where that entry was the only feasible means of executing the court's order, and where the conduct of the agents while inside petitioner's premises was limited to installation of the listening device, there is no basis

[27] Unlike the initial entry, re-entries to fix or relocate an existing listening device cannot so readily be viewed as having been within the contemplation of the judge who issued the eavesdropping order.

for refusing to hold that the entry was implicitly authorized by the eavesdropping order and was constitutionally reasonable.

The soundness of the foregoing argument is further bolstered by the fact that the issuing judge, knowing that a surreptitious entry is likely to be required to carry out an eavesdropping order, is free to regulate or restrict the means of installing the equipment as a condition to issuance of the warrant (see *United States* v. *Scafidi*, *supra*, 564 F.2d at 644 (Gurfein, J., concurring)), just as a judge or magistrate issuing a conventional warrant can impose conditions upon the manner of its execution. See *Zucher* v. *Stanford Daily*, *supra*, 436 U.S. at 566; *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976). Disobedience to such directives presumably would justify suppression of the evidence seized. But the fact that the court maintains control over the manner of execution of the warrant if it chooses to exercise such control does not mean that it must so choose or that a search is invalid if the court fails explicitly to address the manner of execution, particularly when the likely manner of execution is evident to the court from the face of the application.

Even though we contend that it is not constitutionally required, we recognize that the preferable course is for government agents to include a description of the proposed method of installation in an application for an eavesdropping order and for the court expressly to authorize the entry in the order authorizing the eavesdropping. As several

courts have observed, it imposes no significant additional burden on the government to seek explicit authorization for the surreptitious entry. See *United States* v. *Scafidi*, *supra*, 564 F.2d at 644; Pet. App. 7a. Moreover, because a post-interception finding that the method used to install the listening device was unreasonable may jeopardize a lengthy investigation or an important prosecution, it helps ensure the success of the investigation if the applicant obtains prior judicial approval for the method to be used to install the listening device.

In light of these considerations, the Department of Justice has, since the decision in the *Ford* case, sought express judicial approval in all eavesdropping applications for the entry necessary to install the eavesdropping device. Attorneys supervising the interception of oral communications have also been instructed to seek explicit judicial approval for each subsequent entry required to effectuate the surveillance. The following language is currently included in Departmental authorizations of applications for interception of oral communications:

> The application should include a request that the order providing for the interception specifically authorize surreptitious entry for the purpose of installing and removing any electronic interception devices to be utilized in accomplishing the oral interception. Further, an order should be obtained for each additional entry to replace or maintain any oral interception devices.

Because the interception in this case occurred in 1973, before the Department's policy was instituted, no separate authorization was sought for the entry. Nonetheless, petitioner's conviction should not be upset on this ground. For the reasons we have stated, even though a separate entry authorization may be prudent and may be required in some cases, it was not required in this case by either the statute or the Constitution. Accordingly, neither the statutory suppression remedy (18 U.S.C. 2515, 2518(10)(a)) nor the Fourth Amendment's exclusionary rule requires that the recordings of petitioner's intercepted conversations be suppressed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

WILLIAM C. BRYSON
KENNETH S. GELLER
Assistants to the Solicitor General

JEROME M. FEIT
KATHERINE WINFREE
Attorneys

DECEMBER 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 283995 251